

## WORKPLACE BULLYING: THE PROBLEM AND THE CURE

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Michael: “So the *next* day, my father went to see him, only this time with Luca Brasi. Within an hour, he signed a release for a certified check of one thousand dollars.” Kay: “How did he do that?” Michael: “My father made him an offer he couldn’t refuse.” Kay: “What was that?” Michael: “Luca Brasi held a gun to his head, and my father assured him that either his brains or his signature would be on the contract. That’s a true story.”<sup>1</sup>

Bullies, they’re everywhere. We have all known one, many of us have worked for one, and some of us have been one. We all remember the schoolyard bully, the “big” kid who picked on everyone, for fun, for power, for prestige. We were told to ignore them because they were the bad kids, the lazy kids, the insecure kids, the kids who would never amount to anything in life.<sup>2</sup> We were told wrong.<sup>3</sup> The schoolyard bullies grew up, got good jobs, and continue to terrorize us.<sup>4</sup>

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1. Jenny M. Jones, *THE ANNOTATED GODFATHER* 45-46 (2007).

2. See Brett Scharffs, *The Role of Humility in Exercising Practical Wisdom*, 32 U.C. DAVIS L. REV. 127, 195 (1998) (“As on the school playground, bullies are often insecure.”).

3. See Mary Jo McGrath, *SCHOOL BULLYING: TOOLS FOR AVOIDING HARM AND LIABILITY* 10 (2007) (“The commonly held assumption that bullies only appear tough but are really anxious and insecure is incorrect. Studies of bullies as a group indicate the opposite: Most bullies have little anxiety and insecurity or are average in this area, and they do not have poor self esteem. In fact, bullies often have a very positive self image.”).

4. See, e.g., Michael G. Harvey, Joyce T. Heames, R. Glenn Richey & Nancy Leonard, *Bullying: From the Playground to the Boardroom*, 12 J. LEADERSHIP & ORG’L STUD. 1, 1 (2006) (“The unfortunate reality is that bullying is moving from the playground of our childhood, to the offices and boardrooms of our adult business arenas.”); John A. Mack, *The Law of Bullying: Off the Playground and Into the Workplace*, 62 BENCH & B. MINN. 20, 20 (2005), available at <http://www2.mnbar.org/benchandbar/2005/sep05/bullying.htm> (“Playground bullies grow up. They leave behind the broken toys and bloodied noses of the sandlot in exchange for the

Workplace bullies. They're the worst of the bunch. We spend a third of our life at work, often more.<sup>5</sup> The workplace should be, if not pleasant, at least tolerable. Instead, workplace bullying is a leading cause of violence in the workplace.<sup>6</sup> We work, we want to work, but not with THEM, and not for THEM. Bullying has reached "epidemic"<sup>7</sup> proportions and is a "crippling and devastating problem with the potential to damage targets' self-esteem, physical health, cognitive functioning, and emotional health."<sup>8</sup> Workplace bullying also causes substantial problems for the business organization, including "lost work time, decreased productivity, poor morale and loss of employees."<sup>9</sup> Now is the time to stop workplace bullying.

This paper addresses the problems of, and potential solutions for, workplace bullying. Section I examines the nature and problem of bullying in the workplace, noting the extent and cause of this destructive phenomenon. Section II examines four potential legal remedies to the problem of workplace bullying, two legislative and two common law options, including a proposal for the creation of a new common law remedy.

## I. THE BULLY PROBLEM

"I've got a gun out there in my purse and up 'til now I've been forgiving and forgetting, 'cuz that was the way I was brought up . . . But I swear, you say one more word about me and I'll get that gun of mine and I'll change you from a rooster to a hen with *one shot*."<sup>10</sup>

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broken pencils and bruised egos of the office.").

5. Gregory J. Hare, *Employee Participation Programs: A Great Idea, But Are They Lawful?*, 1991 DET. C. L. REV. 973, 1014 (1991) ("[M]ost adults spend almost one-third of their lives at work."); *Four Paths to Less Business Stress*, ACHIEVING RESULTS IN A CHANGING WORLD (The Morse Group LLC), Dec. 2008, available at <http://www.themorsegroup.net/newsletters/10Dec08-Stress.pdf> ("We typically spend one-third to one-half of our adult lives at work.").

6. Carla Gonçalves Gouveia, *From Laissez-Faire to Fair Play: Workplace Violence & Psychological Harassment*, 65 U.T. FAC. L. REV. 137, 141 (2007).

7. *Id.*

8. Pamela Lutgen-Sandvik, Sarah J. Tracy & Jess K. Alberts, *Burned by Bullying in the American Workplace: Prevalence, Perception, Degree and Impact*, 44 J. MGMT. STUD. 835, 838 (2007) (internal citations and quotations omitted).

9. William R. Corbett, *The Need for a Revitalized Common Law of the Workplace*, 69 BROOK. L. REV. 91, 99-100 (2003).

10. Jeff Lunden, *Dolly Parton, WORKING '9 TO 5' TO GET TO BROADWAY*, NAT'L PUB. RADIO, SEPT. 20, 2008, <http://www.npr.org/templates/story/story.php?storyId=94823815> (last visited Oct. 29, 2009).

### A. Identifying the Bully Problem

The right of every employee “to the protection . . . from . . . wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being – a concept at the root of any decent system of ordered liberty.”<sup>11</sup> Yet, with few exceptions, employers may treat their employees as they see fit.<sup>12</sup> To be sure, the law protects employees against statutorily recognized discrimination, but provides no protection against general workplace harassment.<sup>13</sup> There is no requirement that the workplace be hospitable, or even civil.<sup>14</sup> To the contrary, the employment relationship is more often akin to a battlefield than a place of ordered liberty.<sup>15</sup> At the heart of this organizational dysfunction is the bully.

#### i. Bullying – Its Prevalence & Impact

In September 2007, The Workplace Bullying Institute, in cooperation with Zogby International, released a comprehensive survey (“Survey”) measuring the prevalence of workplace bullying in the United States.<sup>16</sup> Based on this survey of 7,740 online interviews, the following key

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11. *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966).

12. *See, e.g., Payne v. Western & Atlantic Railroad Co.*, 81 Tenn. 507, 519-20 (1884) (“All may dismiss their employees at will, be they many or few, for good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong. *A fortiori* they may ‘threaten’ to discharge them without thereby doing an illegal act, per se.”), *overruled on other grounds*, *Hutton v. Watters*, 132 Tenn. 527, 544 (1915); Richard Michael Fischl, *Rethinking the Tripartite Division of American Work Law*, 28 BERKELEY J. EMP. & LAB. L. 163, 183 (2007) (“A legal regime that prohibits employers from discriminating against employees, but—thanks in large measure to the employment-at-will rule—does not otherwise require them to treat their employees fairly, creates incentives for workplace practices that may ultimately undermine antidiscrimination goals and fairness norms alike.”).

13. *See The Law of Bullying*, 62 BENCH & B. MINN. 20, 22 (“Historically, employees had little legal recourse against bullying, unless they could tie the behavior to certain protected classes, such as gender or race. In other words, if the boss is mean to everybody, he or she is not breaking the law.”).

14. *See, e.g., Samoza v. Univ. of Denver*, 513 F.3d 1206, 1219 (10th Cir. 2008) (affirming summary judgment “[d]espite the testimony that the Appellants endured various instances of incivility, rudeness, and allegedly offensive statements regarding their ethnicity and national origin”); Samuel A. Marcossou, *Who is “Us” and Who is “Them” – Common Threads and the Discriminatory Cut-Off of Health Care Benefits for AIDS Under ERISA and the Americans with Disabilities Act*, 44 AM. U. L. REV. 361, 417 n.285 (“An employer may treat all its employees badly or unfairly, so long as it does so even-handedly.”).

15. Harvey et al., *supra* note 4, at 4 (“[A] manager at one of the nations leading wholesalers admitted to bullying saying, ‘It is me against them [the employees] and I am going to win or die trying.’”).

16. WORKPLACE BULLYING INST. & ZOGBY INT’L, U.S. WORKPLACE BULLYING SURVEY (2007), <http://www.workplacebullying.org/res/N-N-Zogby2007.pdf> (last visited Oct. 29, 2009).

observations were made regarding the extent of workplace bullying.<sup>17</sup>

Thirty-seven percent of American workers, approximately 54,000,000 workers have been bullied at work, and forty-nine percent of workers have been affected by workplace bullying, either through direct contact with the bully or by witnessing one or more bullying acts.<sup>18</sup> This last point is particularly telling as to the extent of the problem. While bullying has serious negative consequences for the bully's victim (e.g., "high degree bullying may result in permanent psychological damage, post-traumatic stress disorder, increased risk of heart disease, and even suicide"),<sup>19</sup> secondary victims (e.g., those witnessing bullying at work) are also at risk, reporting "increased levels of 'destabilizing forces at work, excessive workloads, role ambiguity and work relationship conflict.'" <sup>20</sup>

The harm to secondary victims is compounded when they are forced into the bully's web as active participants.<sup>21</sup> This behavior is often referred to as "mobbing."<sup>22</sup>

Mobbing is an emotional assault. It begins when an individual becomes the target of disrespectful and harmful behavior. Through innuendo, rumors, and public discrediting, a hostile environment is created in which one individual gathers others to willingly, or unwillingly, participate in continuous malevolent

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17. *Id.* (The Survey had a margin of error of +/- 1.1 percentage points.).

18. The Workplace Bullying Institute (WBI) defines bullying as "repeated, health-harming mistreatment of one or more persons (the targets) by one or more perpetrators that takes one or more of the following forms: [v]erbal abuse, [o]ffensive conduct/behaviors (including nonverbal) which are threatening, humiliating or intimidating, [w]ork interference – sabotage -- which prevents work from getting done." Workplace Bullying Inst., *Definition of Workplace Bullying*, Oct. 21, 2009, <http://www.workplacebullying.org/targets/problem/definition.htm>; *see also*, Lutgen-Sandvik et al., *supra* note 8, at 854 ("Given the data available, we can speculate that approximately 35-50 percent of US workers experience one negative act at least weekly in any 6-12 month period, and nearly 30 per cent experience at least two types of negativity frequently.").

19. Lutgen-Sandvik et al., *supra* note 8, at 855; *see also*, Sarah J. Tracy, Pamela Lutgen-Sandvik, Jess K. Alberts, *Nightmares, Demons, and Slaves: Exploring the Painful Metaphors of Workplace Bullying*, 20 MGMT. Q. 148, 153 (2006) ("Repeated abuse can result in emotional responses such as helplessness, anger, despair, and shock and health problems such as musculoskeletal complaints, sleep problems, chronic fatigue, and loss of strength.") (internal citations omitted).

20. Lutgen-Sandvik et al., *supra* note 8, at 845 (quoting Dawn Jennifer, Helen Cowie, Katerina Ananiadou, *Perceptions and Experience of Workplace Bullying in Five Different Working Populations*, 29 AGGRESSIVE BEHAVIOR 489, 495 (2003)).

21. *See* Lutgen-Sandvik et al., *supra* note 8, at 845 ("[S]econdary victims are 'employees who themselves were not violated but whose perception, fears and expectations are changed as a result of being vicariously exposed to violence.'").

22. David C. Yamada, *The Phenomenon of "Workplace Bullying" and the Need for Status-Blind Hostile Work Environment Protection*, 88 GEO. L.J. 475, 481 (2000).

actions to force a person out of the workplace.<sup>23</sup>

It is no wonder, then, that “[t]argets of bullying at work anticipate the workday with dread and a sense of impending doom. . . . Privately, they are profoundly ashamed of being victimized and are confused at their apparent inability to fight back and protect themselves.”<sup>24</sup>

Too often the business enterprise fails to take into account both the personal and organizational costs associated with bullying. As a case in point, consider the employees interviewed at the “now defunct Scott Paper Company” who suggested that

Al Dunlap’s (company CEO) bullying behavior was a key determinant in the failure of one of America’s top paper manufactures. One interviewee noted; “You couldn’t look the guy in the eye for fear you would get fired or at least dressed down for no reason at all. If I needed something to repair the equipment, I just rigged it or went without. We kind of ‘half-assed’ everything under his watch . . . we didn’t have a choice.”<sup>25</sup>

While the costs are not always as dramatic as those faced by Scott, they are real, and very harmful:

By beating down employees, change agents, and teams of

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23. *Id.*

24. Lutgen-Sandvik et al., *supra* note 8, at 837.

25. Harvey et al., *supra* note 4, at 3; *see also*, David C. Yamada, *Employee Perceptions of Internal Conflict Management Programs & ADR Processes for Preventing & Resolving Incidents of Workplace Bullying: Ethical Challenges for Decision-Makers in Organizations*, 8 EMP. RTS. & EMP. POL’Y J 375, 377 (2004) (noting several examples of workplace bullying). A first-hand recount of workplace bullying follows:

One worker who is employed in a non-union setting describes his or her experience as follows: “I worked at the [ABC Corporation]. The staff accountant was always mean, for no reason. I would e-mail requests for info that she would never answer. I would leave voicemails; she would never respond. Finally, I reported her to my supervisor. He told me that she was just moody like that and I should get over it. I pushed and forced the issue, but to no avail. One day I broke down crying because of the unfair treatment; I was sent home. I called in the next day to request one more day off because of illness. I was told not to come back, effective immediately. I could not even clean out my own desk. They had one of the other hateful employees take my belongings home for me to get from her. I have not seen or heard from her since.” Another surveyed worker describes as follows: “I was humiliated by a co-worker at a prior job. I was then yelled at or given the silent treatment by this same person who is White. I am Asian. I felt this treatment could have been racially motivated but I don’t know this for a fact. This person gave preferential treatment to males and seemed to dislike females also. I took this matter to my manager and eventually the president of this small company. She was given a warning and took a leave of absence. After this leave, things did not change and I left the company. Never have I ever encountered this situation and felt it was undeserving and not dealt with properly.” *Id.* at 377.

employees, bullies involuntarily transmit signals to potential future employees that the firm is not a good place to work. Consequently, the quality of the pool of applicants diminishes and the firm is forced to trade down on talent when selecting the best possible candidates for employment.<sup>26</sup>

The consequent harm to the employment pool should serve as an alarm to corporate America. Despite these operational costs, however, bullying is on the rise.<sup>27</sup> So, why are bullies tolerated? The simple answer is bullies are perceived as adding value to the organization.<sup>28</sup> In fact, “targets of harassment are four times more likely to be fired than their bullying boss.”<sup>29</sup> Eventually, “the bullied individual learns to ‘accept’ the aggression of the bully as a normal part of his or her job.”<sup>30</sup> It seems that cultures, which encourage an environment of conflict under the belief that doing so increases the value of the organization considers the operational costs associated with bullying justified.<sup>31</sup>

## ii. Bullying – It’s Not Just a Matter of Civility

Workplace bullying is, by and large, an outgrowth of the corporate

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26. Harvey et al., *supra* note 4, at 3.

27. *Id.* at 2.

28. See Michael G. Harvey, M. Ronald Buckley, Joyce T. Heames, Robert Zinko, Robyn L. Brouer & Gerald R. Ferris, *A Bully as an Archetypal Destructive Leader*, 14 J. LEADERSHIP & ORGANIZATIONAL STUD., 117, 122 (“Career progress is oftentimes facilitated by these negative characteristics, almost as though the organization values self-promotion and the devaluation of others in the organization.”).

29. Jacquelynne M. Jordan, *Little Red Reasonable Woman & the Big Bad Bully: Expansion of Title VII & the Larger Problem of Workplace Abuse*, 13 WM. & MARY J. WOMEN & L. 621, 658 (2007) (citing GARY H. NAMIE, WORKPLACE BULLYING INSTITUTE, THE WBI 2003 REPORT ON ABUSIVE WORKPLACES 3 (2003), <http://www.bullyinginstitute.org/res/2003results.pdf>).

30. Harvey et al., *supra* note 28, at 122 (citation omitted); see also Tracy et. al., *supra* note 19, at 162 (“[S]ome targets became so exhausted and overwhelmed with the fight that they viewed bullying as uncontrollable nightmare.”).

31. See Allyce Bess, *Whipping the Work Force Out of Shape*, S.F. BUS. TIMES, July 16-22, 1999, at 3, available at <http://sanfrancisco.bizjournals.com/sanfrancisco/stories/1999/07/19/story8.html> (“Courts here have not generally accepted the argument that workers should be free from even abusive treatment at the hands of their bosses or coworkers. Nor should they, argues Jeff Tannenbaum, a lawyer at San Francisco-based employment law firm Littler Mendelson. Tannenbaum asserts that the United States not only has more laws than it can handle, but that bullying has its benefits. ‘This country was built by mean, aggressive, sons of bitches,’ said Tannenbaum. ‘Would Microsoft have made so many millionaires if Bill Gates hadn’t been so aggressive?’ Tannenbaum says that inappropriate bullying is in the eye of the beholder. Some people may need a little appropriate bullying in order to do a good job. Others assert that those who claim to be bullied are really just wimps who can’t handle a little constructive criticism.”).

values we most esteem. “[B]ullying is not simply an interpersonal issue but is an organizational dynamic that impacts all who are exposed . . . .”<sup>32</sup> Until the business community is willing to address this problem on a structural level, or is otherwise forced to do so, there is little hope for institutional change. The following rather crude example illustrates the daunting task of reforming the workplace:

It seems obvious that a reasonable person would find two repeated requests by a supervisor to “flash your tits” to be offensive. Then, having been told that the offender would be relieved of duty, instead the offender went unpunished and Ms. Pastula was transferred to a different crew where the hostile environment not only continued but worsened. Mark Rowley made the statement 20-30 times that day, to Ms. Pastula and others, that “we’re not going to have titty Tuesday, we’re going to have pants down Wednesday.” Mr. Rowley came up with new humiliating comments on a regular basis, and not a day would go by without someone making a crude remark. Even the supervisor of that crew, Steve Rowley, made sexual and degrading comments about whether the crew had “gotten any skin” the night before. . . . Only after Ms. Pastula reported the harassment to DOT officials and those officials called Lane [Construction] did Lane investigate and again, rather than punishing the harassers, Lane transferred Ms. Pastula to a different position. Shortly thereafter, Ms. Pastula was put back on Jeff Albee’s crew and was forced to ride separately to the job site and endure the ostracism of her co-workers.<sup>33</sup>

Despite this protracted hostility, the court hesitated, noting that it had an obligation to “differentiate between potentially meritorious suits involving severely or pervasively hostile treatment and non-meritorious suits involving basic civility issues characterized by ‘isolated incidents,’ ‘simple teasing’ or ‘mere offensive’ behavior.”<sup>34</sup> In the end, the court found that

[v]iewed objectively, the collection of offensive utterances that Pastula endured were not sufficiently serious to support a finding that Lane Construction Corporation subjected her to severe or pervasive sexual harassment in the workplace such as could reasonably be regarded as having effectuated a change in the terms and conditions of her employment.<sup>35</sup>

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32. Lutgen-Sandvik et al., *supra* note 8, at 855.

33. Recommended Decision on Motion for Summary Judgment, *Pastula v. Lane Constr. Corp.*, Civil No. 05-133-B-W, 2006 WL 2925239, at \*9 (D. Me. October 11, 2006) (quoting the unpublished Plaintiff’s Motion for Summary Judgment).

34. *Id.* at \*9.

35. *Id.* at \*10 (citations omitted).

Similarly, courts have regularly refused to address the bully problem, noting that there is no legal cause of action for bullying.<sup>36</sup> Thus, employees are left to suffer, and neither of the twin towers of legal recourse (the legislature and the judiciary) show any inclination to help. Much of the problem stems from the mistaken assumption that bullying is merely a form of rudeness; that it is a matter of civil behavior, of mere manners and, as such, is not within the proper scope of court action.<sup>37</sup>

This view demonstrates a fundamental misunderstanding of the scope of the harm. The act of bullying, while lacking civility, is not synonymous with incivility, although “bullying . . . usually include[s] acts of incivility and a sense of being victimized.”<sup>38</sup> Bullying is not, as some have mistakenly assumed, merely a matter of “workplace manners.”<sup>39</sup> Rather, “[i]ncivility could include simple rudeness, either in words or action. Interpersonal [conflict] involve[s] problems that le[a]d to arguments with [other] coworker[s]. Bullying involve[s] persistent criticism, yelling, spreading gossip, insults and ignoring or excluding workers from office activities.”<sup>40</sup>

Incivility is expectable. Bullying is not. It is one thing not to say thank you, or please, or to snub a coworker. While boorish, this behavior is not the full throated bullying that is targeted (i.e., intentional) and destructive to both the organization and the individual; it is not conduct that is “threatening, humiliating or intimidating . . . [w]ork interference—sabotage—which prevents work from getting done.”<sup>41</sup> A bully lacks

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36. See, e.g., Yamada, *supra* note 22, at 478 (“Unfortunately, the growing body of statutory and common-law protections for workers—particularly status-based employment discrimination laws and tort claims for emotional distress—have not been effective against workplace bullying.”); see also Susan Harthill, *Bullying in the Workplace: Lessons From The United Kingdom*, 17 MINN. J. INT’L L. 247, 248 (2008) (“[W]orkplace bullying . . . is a significant problem in the U.S. and yet has no legal remedy.”).

37. See *Samoza v. Univ. of Denver*, 513 F.3d 1206, 1219 (10<sup>th</sup> Cir. 2008) (“Despite the testimony that the Appellants endured various instances of incivility, rudeness, and allegedly offensive statements regarding their ethnicity and national origin [the] legal landscape of employment retaliation claims [has not changed] so as to create a ‘general civility code for the American workplace.’”).

38. Lutgen-Sandvik et al., *supra* note 8, at 841.

39. See Garry Mathiason & Olga Savage, *Defining and Legislating Bullying*, THE COMPLETE LAWYER, Jan.-Feb. 2008, available at <http://www.workplacebullying.org/press/2008tcl4.html> (examining workplace bullying and concluding “that courts are not the appropriate authority to regulate workplace manners”).

40. Meet the Work Bully, <http://well.blogs.nytimes.com/2008/03/11/meet-the-work-bully/> (Mar. 11, 2008, 13:22 EST); see also, Tracy et. al., *supra* note 19, at 152 (“In contrast to workplace incivility, which is defined as low intensity deviant . . . behaviors [that] are characteristically rude and discourteous, displaying a lack regard for others, workplace bullying is escalated and can include screaming, cursing, spreading vicious rumors, destroying the target’s property or work product, excessive criticism, and sometimes hitting, slapping, and shoving.”) (citations and internal quotations omitted) (alterations in original).

41. THE WORKPLACE BULLYING INSTITUTE, DEFINITION OF WORKPLACE BULLYING,



civility and so much more.

*B. Defining The Bully Problem*

While there is no uniform definition of “workplace bullying,” the various working definitions are remarkably similar. For example, the Workplace Bullying Institute has defined workplace bullying as “the repeated, malicious, health-endangering mistreatment of one employee . . . by one or more employees.”<sup>42</sup> Other scholars have defined workplace bullying as “repeated offensive behavior [sic] through vindictive, cruel, malicious or humiliating attempts to undermine an individual or group of employees.”<sup>43</sup> David Yamada, perhaps the foremost advocate of anti-bullying legislation, defines workplace bullying as “the intentional infliction of a hostile work environment upon an employee by a coworker or coworkers, typically through a combination of verbal and nonverbal behaviors.”<sup>44</sup>

Whichever definition one uses, two themes appear to be central: (1) the bullying is intentional, and (2) the bullying activity is harmful, both personally (psychologically and/or physically) and professionally (the activity seriously hinders the target’s ability to effectively carry on his or her work-related duties).<sup>45</sup>

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<http://www.workplacebullying.org/targets/problem/definition.html>.

42. Gary Namie & Ruth Namie, *THE BULLY AT WORK*, 3 (rev. ed. 2003) (alterations in original).

43. Duncan Chappel & Vittorio Di Martino, *VIOLENCE AT WORK* 20 (3d ed. 2006) (emphasis removed).

44. Amanda E. Lueders, *You’ll Need More Than A Voltage Converter: Plugging European Workplace Bullying Laws Into The American Jurisprudential Outlet*, 25 *Ariz. J. Int’l & Comp. L.* 197, 200 (2008) (quoting David C. Yamada, *The Phenomenon of “Workplace Bullying” and the Need for Status-Blind Hostile Work Environment Protection*, 88 *GEO. L. J.* 475, 481 (2000)).

45. See, e.g., Harthill, *supra* note 36, at 247-48 (“Helen Green was employed as a secretary in Deutsche-Bank’s London office. Although she received positive evaluations, promotions, and salary increases, every day at work was terrorizing. Four of her colleagues, including her supervisor, subjected her to a sustained campaign of emotional abuse. They constantly made it difficult for Ms. Green to perform her work by moving her papers, hiding her mail, removing her from document circulation lists, and ignoring and excluding her in meetings and social functions. Ms. Green’s supervisor increased her workload to unreasonable and arbitrary levels. In addition, her colleagues burst out laughing when she walked past them and made crude and lewd remarks. Ms. Green complained about the behavior to management, but no action was taken. Ms. Green eventually developed a major depressive disorder and at one point was taken to [sic] hospital and put on suicide watch. Deutsche-Bank paid for her to undergo stress counseling and assertiveness training but never reprimanded or discharged her colleagues or otherwise intervened.”).

## II. CURING THE BULLY PROBLEM

I know what you're thinking. Did he fire six shots or only five?  
Well to tell you the truth in all this excitement I've kind of lost  
track myself. But being this is a .44 Magnum, the most powerful  
hand gun in the world, and would blow your head clean off,  
you've got to ask yourself one question: "Do I feel lucky?"  
Well, do ya punk?<sup>46</sup> — Harry Callahan

Legislative solutions are generally preferable when compared to judicial ones.<sup>47</sup> Legislators are typically more familiar with the various social policies, constraints, and community mores that impact peoples' lives and our legal system and are, therefore, better able to respond to the evolving nature of law than the judiciary. Chief Justice Burger explained:

What is more important is that we are without competence to entertain these arguments — either to brush them aside as fantasies generated by fear of the unknown, or to act on them. The choice we are urged to make is a matter of high policy for resolution within the legislative process after the kind of investigation, examination, and study that legislative bodies can provide and courts cannot. That process involves the balancing of competing values and interests, which in our democratic system is the business of elected representatives. Whatever their validity, the contentions now pressed on us should be addressed to the political branches of the Government, the Congress and the Executive, and not to the courts.<sup>48</sup>

This is not to say that the judiciary has no role in the creation and formation of laws. "Not only do state-court judges possess the power to 'make' common law, but they have the immense power to shape the States' constitutions as well."<sup>49</sup> As Justice Brown of the California Supreme Court explained:

When exercising common law powers, all judges "make law," for the techniques of the common law involve reaching beyond positive law for a standard to guide the creation of a new legal rule or to supplement an old one. The real question is not whether judges "make law," it is whether they respect the boundaries imposed on their discretion by precedent and statute,

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46. Fred R. Shapiro and Joseph Epstein, *THE YALE BOOK OF QUOTATIONS* 261 (2006) (quoting *Dirty Harry* (Warner 1971)).

47. *Patsy v. Board of Regents of State of Fla.*, 457 U.S. 496, 513 (1992) (stating that, "legislative[,] not judicial[,] solutions are preferable").

48. *Diamond v. Chakrabarty*, 447 U.S. 303, 317 (1980).

49. *Republican Party of Minn. v. White*, 536 U.S. 765, 784 (2002).

and by constitutional text, design and tradition. It is arrogance, carelessness, and a lack of candor that constitute impermissible judicial practice, not creativity.<sup>50</sup>

Simply put, judges may create “common law.” But what is the common law? How is the common law to be understood such that a court may reasonably exercise its powers without overstepping legislative prerogative? Professor Elisabeth Zoller provides the following framework for the judiciary’s right, privilege, and power to make law:

In the common law tradition, to which the United States remains steadfastly faithful, courts are able to rely on a rich legacy of rights and liberties dating from time immemorial. These ancient rights and liberties have never been abrogated; on the contrary, all of them were accepted by the legislatures in the states, and they are still in force when courts decide on their cases. This wealth of rights and liberties is the common law, and this common law is the fulcrum that allows the lever of judicial review to rise so high. As in England, in this country the common law means that in the legal system there exists a bundle of rights and freedoms, coming from the depths of history, which are not part of the social contract but rather are reserved, that is, protected from legislative encroachments. And the role of courts is to dig into this endless wealth of rights, as needed, and remind the legislator of their existence.<sup>51</sup>

From these passages we may derive the following principle: the creation of new law generally belongs to lawfully elected legislative bodies. However, this is not a bright line rule. Not infrequently, the legislative bodies do not act, whether due to some infirmity or mere neglect. During these times of inaction, or when fundamental rights are at issue, the courts may (or even should), step into the fray, settle the problem, and thereby create a pathway for the resolution of similar conflicts.

Deferring all development of the common law to the legislature makes no sense because common law, by definition, is “the body of law derived from judicial decisions, rather than from statutes or constitutions.” Common law is “judge-made” rules as opposed to statutory rules. . . . [W]hile statutes may modify our common law, the common law can properly be modified by judicial decisions . . . . The fundamental characteristic of the common law is its continuously developing jurisprudence. For us to honor and apply an antiquated and outdated principle of common law in deference to the legislature is to avoid our clear

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50. Lane v. Hughes Aircraft Co., 993 P.2d 388, 403 (Cal. 2000) (Brown, J., concurring).

51. Elisabeth Zoller, *Public Law as the Law of Res Publica*, 32 SUFFOLK TRANSNATIONAL L. REV. 93, 101 (2008-2009).

responsibility as judges. We respectfully suggest that the . . . observation that “the legislature is best equipped to handle” such matters ignores the co-equal duty of the judiciary to consider, modify, and thereby redirect the course of our evolving common law.<sup>52</sup>

When there is no relevant statute, when fundamental rights are at issue, and when the courts have no relevant precedent from which resolution of the legal problem may be based, courts ought to create an appropriate cause of action. Doing so will allow the problem presented to be addressed in a fair and equitable manner and will lay the groundwork for resolution of similar problems in our various courts.

This paper examines two potential legislative and two potential judicial options to address the problem of workplace bullying.<sup>53</sup>

A. *Congress to the Rescue – Well, Maybe!*

Reader, suppose you were an idiot. And suppose you were a member of Congress. But I repeat myself.<sup>54</sup> — Mark Twain

i. Legislative Option One: Title VII

Title VII is a significant force in the fight against workplace inequities.<sup>55</sup> However, Title VII is not the panacea of protection some may have hoped for.<sup>56</sup> Title VII prohibits discrimination in the workplace on

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52. *Noone v. Chalet of Wichita, L.L.C.*, 96 P.3d 674, 678-79 (Kan. Ct. App. 2004) (citations omitted) (quoting Black’s Law Dictionary 293 (8th ed. 2004) and *Ling v. Jan’s Liquors*, 703 P.2d 731, 739 (Kan. 1985)).

53. Of the potential legislative responses, one is based on a highly successful though somewhat outdated federal statute. The other is based on proposed state level legislation. While a new federal statute, one that may address the problem globally, is not inconceivable, it is unlikely. *See Corbett, supra* note 9, at 95 (“The failure to enact federal legislative responses to emerging workplace issues does not necessarily signal the demise of employment law in the United States. What it may signal is the end of an era, spanning about thirty years, when federal legislation was the legal method of choice to address emerging workplace problems. We have reached a point in the development of American employment law at which the regulatory panacea for the latter half of the twentieth century has become very difficult to implement. That situation is likely to be exacerbated in the years ahead. The era of federal employment legislation as the predominant type of employment law may be over—at least for a while.”).

54. 2 ALBERT BIGELOW PAINE, MARK TWAIN, *A BIOGRAPHY* 724 (Harper & Brothers 1912).

55. *Johnson v. Transportation Agency*, 480 U.S. 616, 630 (1987) (describing Title VII’s important role of “eliminating the effects of discrimination in the workplace”).

56. Ann C. McGinley, *Creating Masculine Identities: Bullying & Harassment “Because of Sex”*, 79 U. COLO. L. REV. 1151, 1193 (2008) (“Professor Yamada . . . models his bill on current Title VII hostile work environment law and argues that a reason for passing the gender-neutral, anti-bullying law is that courts have failed to interpret Title VII

account of “race, color, religion, sex, or national origin.”<sup>57</sup> By definition, the statutory scheme is self-limiting; it protects the identified classes of people against discriminatory behavior, but no more.

Title VII does not, nor was it designed to, protect against nondiscriminatory workplace harassment. Our Supreme Court has pointedly explained that Title VII may not be used as a “general civility code.”<sup>58</sup> While bullying is more than incivility, the Court’s statement points to a fundamental problem in attempting to graft a bullying cause of action onto the statute – it was not meant to provide such relief; except incidentally where the target is a member of a protected class, but again only so long as the action is discriminatory. Thus, it has been noted that equal opportunity harassers (i.e., those who are jerks regardless of race, sex, etc.) may harass with impunity.<sup>59</sup> The court in *Lewis v. Ivy Tech State College* summarized the problem as follows:

The undisputed facts, when viewed in a light most favorable to the Plaintiff, establish that he did not get along with his supervisor, Jim Zion, whom he believes to be a tyrant, a bully, passive aggressive in his style of management, dishonest, and disrespectful-to [sic] everyone he worked with. However, Title VII “does not guarantee a utopian workplace, or even a pleasant one.”<sup>60</sup>

In short, Title VII protects victims from discriminatory harassment,

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to capture harassing behavior that is gender-neutral in cases in which there is both sexual and gendered treatment and gender-neutral treatment.” (citation omitted)).

57. 42 U.S.C.A. § 2000e-2(a) (2007) (“It shall be an unlawful employment practice . . . (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.”).

58. *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81 (1998).

59. *Jordan*, *supra* note 29, at 647 (“Surprisingly, the Equal-Opportunity Harasser defense, if proven, often results in the bully’s triumph, leaving the plaintiff without a method of recovery. To recover under Title VII, the plaintiff must prove that the alleged harassment was motivated by the victim’s gender, race, country of origin, or religion. A plaintiff who complains of general harassment that lacks such motivation has no comparable legal protection.” (citations omitted)); *see also* *Holman v. Indiana*, 211 F.3d 399, 403 (7th Cir. 2000) (“[I]nappropriate conduct that is inflicted on both sexes, or is inflicted regardless of sex, is outside the statute’s ambit.”).

60. 2006 WL 1408398, AT \*3 (N.D. Ind. May 18, 2006) (quoting *Vore v. Ind. Bell Tel. Co.*, 32 F.3d 1161, 1162 (7th Cir. 1994)); *see also* *Davenport v. Northrop Grumman Systems Corp.*, 281 F. App’x 585, 588 (7th Cir. 2008) (“[C]omplaints about personality conflicts do not merit protection under Title VII.”).

but “does not address generally offensive or unpleasant conduct.”<sup>61</sup> Indeed, “*Title VII* does not provide a cause of action for employees who are exposed to harassment that has no reference to race, sex or national origin.”<sup>62</sup> “[W]hat bothers people about abusive workplace conduct, after all, is not the fact that it may be discriminatory but that it is abusive in the first place.”<sup>63</sup> Unfortunately, Title VII is not the platform upon which relief may be built for generally abusive conduct.

ii. Legislative Option Two: The Healthy Workplace Bill

The Healthy Workplace Bill (“Bill”) is a model anti-bullying bill, designed in large measure by Professor David C. Yamada.<sup>64</sup> “According to Yamada, the bill ‘seeks to give severely bullied employees who have suffered concrete psychological, physical or economic effects the right to sue the bully or the company.’”<sup>65</sup> Accordingly, the Bill makes it unlawful for an employer to: (1) subject an employee to an abusive work environment (as defined in the Bill)<sup>66</sup> or (2) to retaliate against an employee because: (a) the employee has opposed an unlawful employment practice, or (b) has filed a charge or participated in an investigation of an unlawful employment practice.<sup>67</sup>

To its credit, the Bill is the first real legislative option providing claimants a right of judicial redress. However, the Bill is not without its

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61. *St. Hilaire v. The Pep Boys—Manny, Moe and Jack*, 73 F.Supp.2d 1350, 1364 (S.D. Fla. 1999) (citation omitted).

62. *Id.* See also *Potts v. Conecuh-Monroe Counties Gas Dist.*, 2000 WL 1229838, at \*20 (S.D. Ala. 2000) (“While Potts has presented evidence that Johnson’s conduct was physically threatening and humiliating on three occasions during his approximately four years of employment with the defendant, on none of these occasions did Johnson use racial slurs or otherwise denigrate plaintiff’s heritage. This omission is important because it leads inexorably to the conclusion that Johnson’s conduct was not race driven, it being contrary to common sense that a supervisor guilty of racial harassment would refrain from racial epithets during those times when he is physically threatening an employee and roundly yelling at and cursing the employee, but rather, was perforce driven by Johnson’s unredeemable and self-loathing boorish, bullying, offensive and unpleasant character and personality. Title VII simply cannot be used as a shield to protect against physically threatening and humiliating conduct that is not race-based, rather, such protection must necessarily come from an enlightened and sensitive employer.” (citation omitted)).

63. *Jordan*, *supra* note 29, at 647 (quoting Editorial, *Justice Scalia and Mr. Oncale*, WASH. POST, Mar. 8, 1998, at C6).

64. A copy of the complete Bill is included in Appendix A.

65. M. Neil Browne & Mary Allison Smith, *Mobbing in the Workplace: The Latest Illustration of Pervasive Individualism in American Law*, 12 EMP. RTS. & EMP. POL’Y J. 131, 151-52 (2008) (quoting Laurie Meyers, *Still Wearing the “Kick Me” Sign*, MONITOR ON PSYCHOL., July/Aug. 2006, at 68, available at <http://www.apa.org/monitor/julaug06/kickme.html>).

66. Bill, *infra* App’x A, at § 3.

67. Bill, *infra* App’x A, at § 6.

flaws. As one commentator recently observed, “[o]ther than the general requirement that a behavior be persistent and significant for a plaintiff to recover, the bill gives little guidance regarding what is and is not permissible behavior.”<sup>68</sup> Presumably, this reference is to the Bill’s rather open-ended definition of bullying, which must be gathered by reference to several different sections of the Bill.<sup>69</sup>

Simply put, the Bill is overly broad because “anything that bothers an employee could be a cause of action. . . . Without clear standards, judges will be left to craft the details of the law or forced to submit most claims to a jury trial.”<sup>70</sup> Of course, if a statute’s standards are overly-broad, the statute is, by necessity, void. “The void-for-vagueness doctrine reflects the principle that ‘a statute which either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.’”<sup>71</sup> In other words, the statute must be understandable by the average, reasonably intelligent person. However, given the definitional flexibility of the Bill, one is left with serious doubts on this matter.

Equally problematic is the Bill’s alleged statutory damage cap. While the Bill purportedly caps employer damages at \$25,000 for committing “an” unlawful employment practice, there does not appear to be any limit on the number of unlawful employment practices that an employer can commit on a per person basis.<sup>72</sup> If, for example, Employer A on January 1

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68. Lueders, *supra* note 44, at 230 (citation omitted).

69. See Bill, *infra* App’x A, at § 7(2) (“Where an employer has been found to have committed an unlawful employment practice . . . its liability for damages for emotional distress shall not exceed \$25,000 . . .”). An unlawful employment practice is subjecting an employee to “an abusive work environment.” *Id.* at § 3. Abusive work environment means “abusive conduct so severe that it causes tangible harm to the complainant.” *Id.* at § 2(3). Abusive conduct is “repeated infliction of . . . derogatory remarks, insults, and epithets; verbal or physical conduct . . . or the gratuitous sabotage or undermining of a person’s work performance.” *Id.* at § 2(3) (c). While a “single act normally will not constitute abusive conduct, [] an especially severe and egregious act may meet this standard.” *Id.*

70. Lueders, *supra* note 44, at 230 (citation omitted); see also Corbett, *supra* note 9, at 124 (“Among the proposals for new law to address status-neutral workplace harassment, those invoking new statutes are misguided. Harassment and abuse are concepts that are too amorphous to be prohibited by statute. Any statute would say, in effect, ‘Don’t [sic] be mean.’ Although the principle is laudatory, this clearly is a misuse of legislation as a regulatory mechanism, as it would provide no guidance whatsoever. Moreover, since it would likely be so vague, the statute would not alter the case-by-case adjudication that takes place now under the common law protections. It would thus be ineffective and superfluous. By contrast, adjusting common law tort theories would fine-tune the law and harmonize it with societal needs on a case-by-case basis, as well as avoid adding unnecessary law to an already crowded legislative field.”).

71. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 629 (1984) (quoting *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926)) (alteration in original).

72. While the Bill defines unlawful employment practice in terms of “an abusive work

committed an unlawful employment practice based on two incidents of derogatory remarks, then on February 15 committed another unlawful employment practice based on two epithets, etc., it is fairly easy to see how the number of unlawful employment practices can quickly grow, such that if the employer is found to have committed a total of ten (10) unlawful employment practices against its employee, then the employer may be liable for up to \$250,000 in damages, rather than the stated \$25,000. The bill's damage cap is ineffective in two further critical ways: (1) the cap does not apply if the employer has taken a negative employment action<sup>73</sup>; and (2) the statutory cap "does not apply to individually named co-employee defendants."<sup>74</sup> Considering that the Bill holds the employer vicariously liable for the actions of its employees,<sup>75</sup> one wonders whether the statutory cap imposes any meaningful limitation.

The damages problem continues to grow as the number of offended employees increase, such that if the employer has ten (10) bullied employees each with ten (10) actions, the potential damages now rise to \$2,500,000. The damages become particularly alarming in the context of a class action lawsuit where there may be hundreds of employees represented in a single action. Here, the damages could be in the hundreds of millions of dollars. Overly large statutory damages raise due process concerns.<sup>76</sup> If the damages become company crippling, courts may refuse to certify the class.<sup>77</sup>

Finally, there is a concern for strike suits, or suits brought to force settlement, regardless of merit, merely because the risk of loss is too great.<sup>78</sup> Because the costs of litigation can be substantial, defendants are under tremendous pressure to settle, "regardless of the cases' merits."<sup>79</sup>

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environment," abusive work environment is further defined in terms of "abusive conduct" which is further defined as one or more abusive acts. Bill, *infra* App'x A, at §§ 2-4.

73. Bill, *infra* App'x A, at § 7 ("Where an employer has been found to have committed an unlawful employment practice under this Chapter that did not culminate in a negative employment decision, its liability for damages for emotional distress shall not exceed \$25,000 . . .").

74. *Id.*

75. *Id.* at §4.

76. *Zomba Enters., Inc. v. Panorama Records, Inc.*, 491 F.3d 574, 587 (6th Cir. 2007) ("Due process may require courts to reduce a statutory-damage award in a class action.") (citing *Parker v. Time Warner Entm't Co.*, 331 F.3d 13, 22 (2d Cir. 2003)).

77. *Parker v. Time Warner Entertainment Co., L.P.*, 198 F.R.D. 374, 383 (E.D.N.Y. 2001) ("[A] class action is not the superior manner of proceeding where the liability defendant stands to incur is grossly disproportionate to any actual harm sustained by an aggrieved individual.").

78. A strike suit is defined as a "suit (esp. a derivative action), often based on no valid claim, brought either for nuisance value or as leverage to obtain a favorable or inflated settlement." BLACK'S LAW DICTIONARY 1448 (7th ed. 1999).

79. Lawrence W. Schonbrun, *The Class Action Con Game*, 20 REGULATION 50, 52 (1997).



This pressure becomes especially problematic for defendants facing potentially ruinous litigation.

These shortcomings point to a further problem, perhaps an insurmountable one, in crafting an appropriate legislative response: the difficulty of drafting legislation that fits the varying characteristics of workplace bullying. The required degree of “analytical flexibility . . . cannot be readily built into a statute.”<sup>80</sup>

Such flexibility is necessary both because of the variety of factual situations, and the lack of consensus on the societal balancing of the conflicting interests of employers and employees. On the issue of electronic monitoring in particular, employers’ interests are numerous and credible; consequently, it is not clear how and under what circumstances U.S. society should prohibit electronic monitoring by employers. Nor is it clear for what types of harassing or bullying conduct, and by what persons, society should hold employers liable. Further development of the law is needed on a case-by-case basis.<sup>81</sup>

Perhaps the foregoing concerns account for the Bill’s unanimous failure to be enacted into law by any state. Thus far, the Bill has been placed “on the legislative agenda in thirteen U.S. states.”<sup>82</sup> Although introduced on multiple occasions, “no states have passed the Healthy Workplace Bill or similar legislation.”<sup>83</sup> This is not to say that the Bill cannot be corrected and, perhaps, enacted into law. Currently, however, there does not appear to be the legislative will necessary to bring this Bill to fruition.

### C. *The Judicial Cure*

Success is a little like wrestling a gorilla. You don’t quit when you’re tired—you quit when the gorilla is tired.<sup>84</sup> —Robert Strauss

Access to courts for the resolution of civil wrongs is a fundamental right to be freely exercised by all people.<sup>85</sup> “Access to the courts is

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80. Corbett, *supra* note 9, at 95.

81. *Id.* at 95-96.

82. Harthill, *supra* note 36, at 250.

83. Lueders, *supra* note 44, at 198.

84. BOB KELLY, WORTH REPEATING 325 (2003) (quoting Robert Strauss). *But see* Counce v. Nicholson, 2007 WL 1191013, at \*19 (M.D. Tenn. Apr. 18, 2007) (“A reasonable juror could infer that the disagreement between Counce and her supervisors regarding the handling of perceived bullying in the workplace caused Counce’s termination. Thus, the Court concludes that Counce has met the requirements of a *prima facie* case of retaliation under Title VII.”).

85. *Holland v. Lutz*, 401 P.2d 1015, 1023 (Kan. 1965) (“The general rule followed by this and other courts appeals to us as a salutary one. The right of private citizens to resort freely to their courts for redress of wrongs is fundamental to our system of society, and its

particularly important for . . . disenfranchised groups who must rely on the legal system for protection of basic human and civil rights.”<sup>86</sup> There may be no group more fully disenfranchised than the bully’s targets who are “profoundly ashamed of being victimized and are confused at their apparent inability to fight back and protect themselves.”<sup>87</sup>

For this reason, courts must remain open to all who seek their help and ever ready to craft judicial resolutions to the problems presented. It is an important and “proper function of tort law to assign responsibility and create appropriate incentives for safety when there is protracted legislative inaction in response to a continuing serious personal injury toll.”<sup>88</sup> While the bullied have repeatedly sought legislative aid, no relief has been provided. The situation is grave. Without court action, the toll in terms of human and organizational carnage will only grow as the bullies continue to be rewarded for their reprehensible behavior.<sup>89</sup>

Courts would do well to keep in mind the admonition of Justice Story:

[C]ourts of equity constantly decline to lay down any rule which shall limit their power and discretion as to the particular cases. . . . And there is wisdom in this course, for it is impossible to foresee all the exigencies of society which may require their aid and assistance to protect rights and redress wrongs. The jurisdiction of these courts, thus operating by way of special injunction, is manifestly indispensable for the purpose of social justice in a great variety of cases, and therefore should be upheld by a steady confidence.<sup>90</sup>

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exercise is to be encouraged, not hampered.”); *Bollinger v. Texas Co.*, 95 So. 2d 132, 137 (La. 1957) (“It is fundamental that the function of a court is to redress wrongs and where there has been no injury there is no cause for judicial action.”); *State v. Superior Court*, 159 P. 92, 97 (Wash. 1916) (“It is impossible to foresee all the exigencies of society which may require the aid and assistance of courts of equity to protect rights or redress wrongs. The jurisdiction of such courts is manifestly indispensable in a great variety of cases for the purposes of social justice, and therefore should be fostered and upheld by a steady confidence.”) (citing 1 JOSEPH STORY, EQUITY JURISPRUDENCE 263 (13th ed. 1886)).

86. Suzzette M. Malveaux, *Statutes of Limitations: A Policy Analysis in the Context of Reparations Litigation*, 74 GEO. WASH. L. REV. 68, 84 (2005).

87. Lutgen-Sandvik et al., *supra* note 8, at 837.

88. Robert L. Rabin, *Enabling Torts*, 49 DEPAUL L. REV. 435, 436 (1999).

89. Browne & Smith, *supra* note 65, at 142 n.58 (“[C]ertain workplace environments can be conducive to bullying. These include businesses that have ‘an obsession with outcomes’ and focus on ‘short-term planning’ to meet the expectations of management and investors. Such a climate may reward bullies for unduly pressuring their co-workers to work harder and faster, or meet deadlines. In these environments, employees are guided by fear for their jobs.”) (citation omitted); Jordan, *supra* note 29, at 658 (“All too often, supervisors who manage with bully power are considered effective and are therefore rewarded for what is perceived to be assertive, direct management.”).

90. *Kellogg v. King*, 114 P. 378, 386-87 (Cal. 1896) (quoting 2 JOSEPH STORY, EQUITY JURISPRUDENCE §§ 856 b., 863, 929, 948 (13th ed. 1886)).

i. Common Law Option One: Intentional Infliction of Emotional Distress

Intentional Infliction of Emotional Distress (“IIED”) (also known as the tort of outrage) is, as the name suggests, one of several intentional torts. While the elements necessary to establish a claim for IIED vary somewhat from state to state, generally the plaintiff must show: “(1) The conduct must be intentional or reckless; (2) The conduct must be extreme and outrageous; (3) There must be a causal connection between the wrongful conduct and the emotional distress; (4) The emotional distress must be severe.”<sup>91</sup>

At first blush, IIED appears to be the appropriate tort from which to craft relief for those suffering from bullying in the workplace. First, IIED is recognized by nearly every state.<sup>92</sup> Second, IIED provides relief for claims of mental distress, as that is the tort’s purpose. Furthermore, the Restatement (Second) of Torts neatly anticipates the application of IIED to the peculiar problems employees face in the workplace.<sup>93</sup> Finally, the tort has recently received a measure of favor in the context of workplace bullying:

In determining whether the defendant assaulted the plaintiff or committed intentional infliction of emotional distress, the behavior of the defendant was very much an issue. The phrase “workplace bullying,” like other general terms used to characterize a person’s behavior, is an entirely appropriate consideration in determining the issues before the jury. As evidenced by the trial court’s questions to counsel during pre-trial proceedings, workplace bullying could “be considered a form of intentional infliction of emotional distress.”<sup>94</sup>

Unfortunately, the acclaim has not been universal. While IIED’s first

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91. *Harris v. Jones*, 380 A.2d 611, 614 (Md. 1977) (citing *Womack v. Eldridge*, 210 S.E.2d (Va. 1974)).

92. *Twyman v. Twyman*, 855 S.W.2d 619, 621-22 nn.2-3 (Tex. 1993) (identifying forty-seven states that recognize IIED (forty-four of which adopted the tort as set out in § 46(1) of the Restatement (Second) of Torts)). As stated in § 46(1), “One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.”

93. *Bridges v. Winn-Dixie Atlanta, Inc.*, 335 S.E.2d 445, 448 (Ga. Ct. App. 1985) (“Moreover, the existence of a special relationship in which one person has control over another, as in the employer-employee relationship, may produce a character of outrageousness that otherwise might not exist.”) (citing Restatement (Second) of Torts § 46(1), cmt. e)).

94. *Raess v. Doescher*, 883 N.E.2d 790, 799 (Ind. 2008) (noting that while the trial court rejected the plaintiff’s IIED claim, workplace bullying evidence was, nonetheless, relevant to the claim).

and third elements present a fairly low bar for plaintiffs to cross,<sup>95</sup> bullied plaintiffs have run into substantial difficulty with the tort's second requirement of extreme and outrageous conduct.<sup>96</sup> As Professor Yamada recently explained:

[T]he degree of severity of conduct and harm to the plaintiff required under hostile work environment and discrimination analyses is notably lower than that required under IIED. In effect, the courts have said that conduct that is actionable under an employment discrimination theory often does not rise to the level of IIED. At least those plaintiffs who can prove status-based harassment or discrimination still have avenues of legal relief via employment discrimination statutes. However, for plaintiffs who are not members of a protected class, or for those who are members of a protected class but cannot establish a legally sufficient link between the complained-of behavior and their protected status, IIED may be the only possible cause of action. Unfortunately for them, the thresholds for establishing extreme or outrageous conduct and severe emotional distress are simply too high for IIED to serve as a useful weapon against workplace bullying.<sup>97</sup>

The New York Court of Appeals further confirmed this concern, noting that “of the intentional infliction of emotional distress claims considered by this Court, every one has failed because the alleged conduct

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95. As to the first element, a mere showing of recklessness is all that is required. That is, the plaintiff does not have show that the defendant set out to purposely harm the plaintiff. As the Supreme Court of Tennessee explained, “reckless misconduct generally has not been perceived as conduct which must be directed toward specific, pre-identified victims.” *Doe 1 ex rel. Doe 1 v. Roman Catholic Diocese of Nashville*, 154 S.W.3d 22, 37 (Tenn. 2005). That is, “recklessness cannot require that the actor aim the conduct toward a specific person or a specific result, for to do so would contradict the inattentive and thoughtless nature of disregard.” *Id.* The third element requires nothing more than a showing of causality.

96. Restatement (Second) of Torts § 46(1); *see also* *Perez v. Nike, Inc.*, 2008 WL 282271, at \*2 (D.Or. Jan. 30, 2008) (“Here, plaintiff alleges that defendant occasionally denied him the services of an interpreter, insulted another Hispanic employee in his presence, subjected plaintiff to “verbal abuse” and/or disciplinary measures when he requested family leave and accommodations for his back injury, treated plaintiff differently from similarly-situated employees, and failed to remedy harassing conduct after plaintiff complained about it. Even if plaintiff’s allegations are true, defendant’s actions do not rise to the level of conduct that ‘extraordinarily’ transcends the boundaries of socially acceptable behavior under Oregon law.”). *But see* *Wheeler v. Marathon Printing, Inc.*, 974 P.2d 207, 215 (Or. Ct. App. 1998) (“[T]here was ample evidence for the jury to conclude that Wilkinson was a sadistic bully who enjoyed preying on plaintiff’s fragile mental state, and who, despite plaintiff’s pleas to stop, did everything he could to torment plaintiff, even after plaintiff’s suicide attempt. The totality of Wilkinson’s conduct, by any measure, was extraordinarily vicious and intolerable.”).

97. Yamada, *supra* note 22, at 503.

was not sufficiently outrageous.”<sup>98</sup> This is true, in part, because “even harsh and unnecessary discipline or pervasive yelling in the workplace does not constitute intentional infliction of emotional distress.”<sup>99</sup>

Even where courts have been more receptive to IIED claims based on workplace abuse, it is not uncommon for those courts to require a second supporting tort, creating the impression that workplace abuse is somehow less worthy of judicial relief. So, for example, some Florida “courts . . . have allowed claims for intentional infliction of emotional distress in the workplace to go forward, where the claims involve persistent verbal abuse coupled with repeated offensive physical contact.”<sup>100</sup> Short of “offensive

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98. *Howell v. N.Y. Post Co.*, 612 N.E.2d 699, 702 (N.Y. 1993); *see also Prunty v. Arkansas Freightways, Inc.*, 16 F.3d 649, 654 (5th Cir. 1994) (“In other words, even though conduct may violate Title VII as sexual harassment, it does not necessarily become intentional infliction of emotional distress under Texas law. Only in the most unusual cases does the conduct move out of the ‘realm of an ordinary employment dispute’ . . . .”); *Roscoe v. Hastings*, 43,942, p.5 (La. App. 2 Cir. 1/14/09); 999 So. 2d 1218, 1221 (“Although recognizing a cause of action for intentional infliction of emotional distress in a workplace setting, this state’s jurisprudence has limited the cause of action to cases which involve a pattern of deliberate, repeated harassment over a period of time. . . . Moreover, the conduct must be intended and calculated to cause severe emotional distress, not just some lesser degree of fright, humiliation, embarrassment or worry.”) (citation omitted); *Lee v. Golden Triangle Planning & Dev. Dist., Inc.*, 797 So. 2d 845, 845 (Miss. 2001) (holding that there was no intentional infliction of emotional distress under Mississippi law); *Magidson v. Wachovia Bank, NA*, 2007 WL 4592230, \*4 (M.D.N.C. Dec. 27, 2007) (“North Carolina courts have been reluctant to extend intentional infliction of emotional distress liability in the workplace.”).

99. *Ward v. Conn. Dept. of Pub. Safety*, 2009 WL 179786, \*15 (D. Conn. Jan. 21, 2009) (citations omitted); *see also* Restatement (Second) of Torts § 46(1) cmt. d (“The cases thus far decided have found liability only where the defendant’s conduct has been extreme and outrageous. It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by ‘malice,’ or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, ‘Outrageous!’”).

100. *De La Campa v. Grifols America, Inc.*, 819 So. 2d 940, 944 (Fla. Dist. Ct. App. 2002); *see also GTE Southwest, Inc. v. Bruce*, 998 S.W.2d 605, 613-14 (Tex. 1999) (holding that emotional distress suffered by employees was severe). In the *GTE* case, employees faced a strange barrage of emotional and physical abuse. While *GTE* claimed the “evidence establishes nothing more than an ordinary employment dispute” the court strongly disagreed observing that the evidence demonstrated:

Shields [GTE Supervisor] engaged in a pattern of grossly abusive, threatening, and degrading conduct. . . . Several witnesses testified that Shields used the word “f---” as part of his normal pattern of conversation, and that he regularly heaped abusive profanity on the employees. . . . On one occasion when Bruce asked Shields to curb his language because it was offensive, Shields positioned

physical contact,” plaintiffs are often left without recourse. Even with such conduct it is not unusual for plaintiffs to lose.<sup>101</sup>

The *De La Campa* court neatly summarized the nearly insurmountable hurdle between workplace abuse problems and IIED claims:

Teixeira and Garcia, subjected De La Campa to a severe and pervasive pattern of sexual harassment, including but not limited to, derogatory comments relating to homosexuality and other unwelcome abusive acts and conduct directed at her because of her sexual orientation and because she asserted her right to work free from discrimination. . . . Additionally, . . . De La Campa was intentionally excluded from corporate-sponsored social functions because of her sexual orientation.

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himself in front of her face, and screamed, “I will do and say any damn thing I want. And I don’t give a s--- who likes it.” . . . There was further evidence that Shields’s harsh and vulgar language was not merely accidental, but seemed intended to abuse the employees.

More importantly, the employees testified that Shields repeatedly physically and verbally threatened and terrorized them. There was evidence that Shields was continuously in a rage, and that Shields would frequently assault each of the employees by physically charging at them. When doing so, Shields would bend his head down, put his arms straight down by his sides, ball his hands into fists, and walk quickly toward or “lunge” at the employees, stopping uncomfortably close to their faces while screaming and yelling. . . . Bruce stated that such conduct was not a part of any disciplinary action against her. Further, the incidents usually occurred in the open rather than in private. Bruce testified that, on one occasion, Shields began beating a banana on his desk, and when he jumped up and slammed the banana into the trash, Bruce thought he would hit her. Afterwards, Shields was shaking and said “I’m sick.”

101. *Preston v. Chancellor’s Learning Sys.*, 2009 WL 1583464, at \*7 (S.D. Ind. June 04, 2009) (“Preston alleges that Williams regularly commented on Preston’s bodily features, and her voice and walk. Compl. ¶ 18. He stated how ‘hot’ Preston looked, and what a ‘nice ass’ she had. *Id.* Williams smacked and touched Preston’s buttocks, and picked her up, threw her over his shoulder, and carried her around the office. *Id.* Williams ‘corner[ed]’ Preston in such a fashion that she could not move and then leaned into her personal space. *Id.* Williams called and texted her after work hours and requested that she meet him, pick him up, or ‘do a little dance for him.’ *Id.* Williams previously told Preston that he wanted to ‘have an affair with her’ and that they should ‘run off to Vegas [to] get married.’ *Id.* Williams also discussed several sexual scenarios in detail and placed Preston into those scenarios. *Id.* Moreover, Williams continued this behavior even after Preston told Williams ‘no’ and instructed him to stop his harassment. *Id.* ¶ 19. When Preston confronted management, Williams not only failed to stop his harassment, he retaliated against Preston by changing Preston’s work schedule to hours that Williams’ knew Preston was unavailable. *Id.* ¶ 25. He also distributed Preston’s sales leads to other sales representatives and caused her numbers and pay to suffer. *Id.* The Court concludes that, taking the allegations in the Complaint as true, under Indiana law ‘[r]easonable persons may differ on the questions of whether [Williams’] conduct was extreme and outrageous...’ (quoting *Bradley v. Hall*, 720 N.E.2d 747, 753 (Ind. Ct. App. 1999)).

These allegations of verbal abuse and disparate treatment, if true, constitute objectionable and offensive conduct, but do not rise to the level of outrageousness that is required by law in a claim for intentional infliction of emotional distress in the employment context.<sup>102</sup>

ii. Common Law Option Two: Intentional Infliction of Workplace Abuse

The right to fair treatment at work is fundamental to any system of ordered liberty. As a people, we recoil at the thought of arbitrary standards, systems rigged for failure, workplaces that provide no opportunity for individual growth because they have been designed for denigration rather than elevation:

The right which is violated by an employer . . . is not the employee's right to the job, but the employee's right to equal, fair, and impartial treatment, the violation of which frequently results, *inter alia*, in a significant injury to the victim's dignity and a demoralizing impairment of his or her self-esteem.<sup>103</sup>

The right to be treated in an "equal, fair, and impartial" manner is a core human right. It is fundamental to all of life, including one's work life:

Every human being has a legitimate claim to respect from his fellow human beings and is in turn bound to respect every other. . . . Hence there rests on [the employer] a duty regarding the respect that must be shown to every [employee].<sup>104</sup>

A legislative solution to these thorny issues appears unlikely.

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102. *De La Campa*, 819 So. 2d at 944; *see also* *Earl v. H.D. Smith Wholesale Drug Co.*, 2009 WL 1871929, at \*4 (C.D. Ill. June 23, 2009) ("Courts recognize a workplace claim for intentional infliction of emotional distress only in the most extreme circumstances, such as the berating of a female employee for missing work while hospitalized for premature labor, sexually harassing an employee to the point of threatening to rape and kill her, and intimidating an employee into falsifying work reports in violation of the law."), *Dozier v. Aaron Sales & Lease Ownership for Less*, 2009 WL 1066134, at \*4 (N.D. Okla. April 20, 2009) ("In the employment context, courts have considered a range of conduct claimed by a plaintiff to be sufficient to merit a cause of action for intentional infliction of emotional distress. The courts have consistently applied a very high threshold before recognizing a cause of action for intentional infliction of emotional distress under Oklahoma law concerning employment claims."), *Wal-Mart Stores, Inc. v. Guerra*, 2009 WL 1900411, at \*9 (Tex. App. July 01, 2009) ("Texas has adopted a strict approach to intentional infliction of emotional distress claims arising in the workplace. . . . Texas courts decline to recognize intentional infliction of distress claims for ordinary employment disputes, recognizing that extreme conduct in this context exists only in the most unusual circumstances.").

103. *Mardell v. Harleysville Life Ins. Co.*, 31 F.3d 1221, 1232-33 (3d Cir. 1994).

104. Immanuel Kant, *GROUNDWORK FOR THE METAPHYSICS OF MORALS* 173 (Lara Denis ed., Broadview Press 2005) (1785).

Furthermore, current tort law offers, at best, limited hope. However, a solution based on the modification of IIED principles (which, in turn, was based on the modification of common law contract principles),<sup>105</sup> offers substantial hope, especially given the various state courts' willingness over the past twenty to thirty years to create new employment law.<sup>106</sup> While a legislative solution may be preferable, it is not required and sometimes not desirable.<sup>107</sup>

Wholly new torts, as a matter of experience, are rarely adopted.<sup>108</sup> However, courts have often accepted the modification of existing tort law.<sup>109</sup> "Rejecting the contention that the legislature should have the first

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105. Anita Bernstein, *How to Make a New Tort: Three Paradoxes*, 75 TEX. L. REV. 1539, 1548 (1997) ("Contract and property rationales help the new-tort reform effort immensely, and successful innovators take pains to find them. All four of the new-tort successes owe debts to contract or property rationales. Prosser was lucky to have an obvious contract antecedent for strict products liability, and he made more luck for himself by identifying a contract theme for the new tort of intentional infliction of emotional distress.").

106. Thomas C. Kohler, *The Employment Relation and its Ordering at Century's End: Reflections on Emerging Trends in the United States*, 41 B.C. L. REV. 103, 114 (1999) ("If the legislative developments of the past decade can be characterized as efforts to open access to market work and ensure continued participation in it, then that theme even more strongly stamps many of the leading employment law cases issued by the United States Supreme Court during this period.").

107. For additional clarification see Bernstein, *supra* note 105, at 1564-65. As one attorney noted as part of his strategy to apply common law rather than statutory principles in seeking recompense for a client who experienced sexual harassment at work:

Where jurors might be hostile to all of this "equality" business (and I've found that many of them are), they fully understand and identify with being trapped in a physically and mentally abusive workplace—being a paycheck hostage. Tradition, analogy, venerable themes, existing doctrines, adaptation to circumstances, and common sense: surely Prosser, from whatever vantage point he now observes tort law, nods his blessing. The measured, respectful movement of a new tort will always appear feeble to activists, threatening to its opposition, and of no moment to nearly everyone else; the few of us who look at new torts with admiration will have much to appreciate in the coming years, as past activism settles into entrenched rights and remedies.

108. J. Brian Slaughter, *Spoilation of Evidence: A New Rule of Evidence is the Better Solution*, 18 AM. J. TRIAL ADVOC. 449, 465 (1994) ("The speculativeness of new tort actions and their difficult application militate against them as solutions."); Corbett, *supra* note 9, at 152 n.351 ("Why face the substantial likelihood that a new tort will fail when there are existing torts that can be modified to do the job?"); Hector L. MacQueen, *Searching for Privacy in a Mixed Jurisdiction*, 21 TUL. EUR. & CIV. L.F. 73, 82 (2006) ("[T]he judicial creation of a new tort of invading privacy seems impossible; the protection of privacy outside the realm of personal information will have to find a vehicle within other existing torts. . .").

109. Corbett, *supra* note 9, at 152 n.351; Paul A. LeBel, *Beginning the End Game: The Search for an Injury Compensation System Alternative to Tort Liability for Tobacco-Related Harms*, 24 N. KY. L. REV. 457, 485 (1997) ("One of the most widely adopted modifications in tort doctrine in recent years has been the shift in the treatment of plaintiffs'



opportunity to create the tort, the court noted its new cause of action was more closely related to the tort of ‘improper interference with existing business relationships than with any single substantive topic with which the legislature might deal.’”<sup>110</sup> As further explained by Justice Sutherland:

It is said that the common law is susceptible of growth and adaptation to new circumstances and situations, and that the courts have power to declare and effectuate what is the present rule in respect of a given subject without regard to the old rule; and some attempt is made to apply that principle here. The common law is not immutable, but flexible, and upon its own principles adapts itself to varying conditions.<sup>111</sup>

So then, as the common law is flexible and able to adapt to changing circumstances, the question becomes whether it should be adapted to the problem of bullying in the workplace and, if it should be adapted, what form will the modified tort take?

As noted earlier, IIED, apart from the requirement of extreme and outrageous conduct, offers considerable help for a realistic solution of the bully problem. Not only is IIED an established tort, recognized in nearly every state, but it is also able to address both physical and emotional harm and has begun to receive some attention related to claims of workplace harassment. Unfortunately, as applied to workplace abuse, the attention has been largely negative due, as noted, to the requirement of extreme and

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conduct defenses from total bars to recovery to bases for comparative reductions in the amount of recovery.”); Bernstein, *supra* note 105, at 1548; Andrew Boxberger, *The Missing Link in the Evolution of Law: Michigan’s Failure to Reflect Society’s Value of Companion Animals*, 5 T.M. COOLEY J. PRAC. & CLINICAL L. 139, 154 (2002) (“The legislature has the power to create and adopt new torts. However, new torts are usually judicially created. The courts of Michigan have the ability to adopt and modify new torts.”).

110. *Napreljac v. John Q. Hammons Hotels*, 461 F.Supp.2d 981, 1031 n.33 (S.D. Iowa 2006) (quoting *Springer v. Weeks & Leo Co.*, 429 N.W.2d 558, 561 (Iowa 1988)).

111. *Dimick v. Schiedt*, 293 U.S. 474, 487 (1934); *see also Funk v. United States*, 290 U.S. 371, 381-82 (1933) (“It may be said that the court should continue to enforce the old rule, however contrary to modern experience and thought, and however opposed, in principle, to the general current of legislation and of judicial opinion it may have become, leaving to Congress the responsibility of changing it. Of course, Congress has that power; but, if Congress fail to act, as it has failed in respect of the matter now under review, and the court be called upon to decide the question, is it not the duty of the court, if it possess the power, to decide it in accordance with present-day standards of wisdom and justice rather than in accordance with some outworn and antiquated rule of the past?”); *Hurtado v. California*, 110 U.S. 516, 530 (1884) (“It is more consonant to the true philosophy of our historical legal institutions to say that the spirit of personal liberty and individual right, which they embodied, was preserved and developed by a progressive growth and wise adaptation to new circumstances and situations of the forms and processes found fit to give, from time to time, new expression and greater effect to modern ideas of self-government. This flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law.”).

outrageous conduct.

On the other hand, the courts can and should alter the IIED since “[t]he power of courts to modify this tort springs from the nature of the common law itself. Judges make and administer the legal standards governing the tort of intentional infliction of emotional distress; they can and should change these standards when they appear to work unjustly.”<sup>112</sup> Here, the standards work a clear injustice: victims suffer workplace abuse by bully bosses yet are without remedy for the harms suffered.

Where a person suffers actual emotional harm, the courts have an obligation to ensure that fair compensation is available. To do anything less would result in the loss of a basic constitutional right:

The right to recover actual or compensatory damages is property . . . . The plaintiff is entitled to recover compensation for mental and physical pain and injury to reputation. These are actual damages, and these are property. “The right to recover damages for an injury is a species of property, and vests in the injured party immediately on the commission of the wrong. It is not the subsequent verdict and judgment, but the commission of the wrong, that gives the right. The verdict and judgment simply define its extent. Being property, it is protected by the ordinary constitutional guaranties.”<sup>113</sup>

Denying compensation for the pain inflicted by workplace bullying is tantamount to taking one’s property (damages for the injury) without just compensation. Such an action offends constitutional sensibilities.<sup>114</sup>

It has been suggested that IIED is sufficiently broad to respond to the type of harm presented by workplace bullying. The necessary dividing line

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112. Paul T. Hayden, *Religiously Motivated “Outrageous” Conduct: Intentional Infliction of Emotional Distress as a Weapon Against “Other People’s Faiths”*, 34 WM. & MARY L. REV. 579, 582-83 (1993).

113. *Osborn v. Leach*, 47 S.E. 811, 813 (N.C. 1904) (quoting WILLIAM B. HALE, *HANDBOOK ON THE LAW OF DAMAGES* 2 n.5 (2d ed. 1912); THOMAS M. COOLEY, *TREATISE ON THE CONSTITUTIONAL LIMITATIONS* 445 (5th ed. 1883)); *see also* *Werner v. Se. Cal. Assoc. Newspapers*, 216 P.2d 825, 840(Cal. 1950) (“When a cause of action arises it has a legal value as a chose action—it is a species of property. Even where there is no legal measure of damages, as in case of slander or assault, the injured party has an indeterminate right to compensation the instant he receives the injury. The verdict of the jury and the judgment of the court thereon do not give, they only define, the right. Such right, when vested, is to the injured party, of the nature of property, and is protected, as property in tangible things, is protected. It cannot be annulled or changed by legislation, nor extinguished except by satisfaction, release or the operation of statutes of limitation.”).

114. *U.S. W. Commc’ns, Inc. v. Pub. Utils. Comm’n of South Dakota*, 505 N.W.2d 115, 126 (S.D. 1993) (“The taking of private property without just compensation is merely confiscation, and offends the constitution.”); *God’s Ctr. Found. v. Lexington Fayette Urban County*, 125 S.W.3d 295, 299 (Ky. Ct. App. 2002) (“The taking of private property . . . may also offend due process and the prohibition on the arbitrary exercise of power [under state law].”).

being the status of the defendant:

For an ordinary defendant[,] the distress induced had to be severe, beyond “mere insult, indignity, annoyance, or even threats . . . lacking in other circumstances of aggravation.” [However,] for agents . . . who are deemed to have “special obligations to the public,” language which is “merely profane, or indecent, or grossly insulting to people of ordinary sensibility” is enough to give rise to liability.<sup>115</sup>

Whether bully bosses may be classified as having “special obligations” is beyond the scope of this paper. However, an argument reaching that conclusion is not difficult to imagine. As employers substantially control the workplace, including the hours worked, the tools of employment, and the work environment, employers may be held to have a special obligation to its employees. If so, the current elements of the tort may suffice. However, as most courts appear to presume the necessity of severe and outrageous behavior, the tort will be more effective if modified to address the circumstances of workplace bullying.

In its modified form, the revised tort may be known as Intentional Infliction of Workplace Abuse (“IIWA”). As noted above, several working definitions of workplace bullying have been proffered, most of which share the basic framework of negative conduct that causes harm over a period of time.<sup>116</sup> In order to categorize bullying behavior into a workable legal template, this paper merges WBI’s proposed statutory definition with Professors Lutgen-Sandvik, Tracy, and Alberts’<sup>117</sup> clinical definition in order to clearly define the elements of IIWA.

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115. Rosa Ehrenreich, *Dignity and Discrimination: Toward a Pluralistic Understanding of Workplace Harassment*, 88 GEO. L.J. 1, 23 (1999) (citation and quotation omitted).

116. See, e.g., Suzy Fox & Lamont E. Stallworth, *Employee Perceptions of Internal Conflict Management Programs and ADR Processes for Preventing and Resolving Incidents of Workplace Bullying: Ethical Challenges for Decision-Makers in Organizations*, 8 EMP. RTS. & EMP. POL’Y J. 375, 376 (2004) (“Workplace bullying can be defined as ‘persistent negative interpersonal behavior experienced by people at work.’”) (citation and quotation omitted); Tracy et al., *supra* note 19, at 152 (“Adult bullying at work involves situations in which employees are subjected to repeated, persistent negative acts that are intimidating, malicious, and stigmatizing.”); Harthill, *supra* note 36, at 249 (“Scholars have defined workplace bullying in different ways, but it can broadly be defined as: ‘repeated offensive behavior through vindictive, cruel, malicious or humiliating attempts to undermine an individual or group of employees.’”) (quoting, Duncan Chappell & Vittorio Di. Martino, *Violence at Work* 20 (3d ed. 2006)).

117. Lutgen-Sandvik et al., *supra* note 8, at 841 (2007) (A person has been bullied “when an individual experiences at least two negative acts, weekly or more often, for six or more months in situations were targets find it difficult to defend against and stop abuse.”).

*Defining Bully Behavior*

- 1) Bullying requires exposure by the target to two or more negative acts on a weekly basis for at least six months;
- 2) Such acts must result in mental or physical harm;
- 3) And must occur in situations where targets find it difficult to defend against or otherwise stop the abuse.

The first requirement defines an employer's potential exposure and allows the employer time in which to correct the offending behavior. Accordingly, if "someone experiences one hostile interaction—regardless of how disturbing—this does not equate to bullying."<sup>118</sup> This point presupposes, of course, that the employer provides its employees with the means to confidentially report the bullying behavior without fear of retaliation. If not, self-help may be useless, barring any other legal protections for targets.<sup>119</sup>

The second requirement satisfies the legal requirement of actual harm before recovery.<sup>120</sup> Of course, whenever mental or emotional harm is at issue there is always a concern for abuse. "The nature of pain and suffering is such that there is no legal yardstick by which to measure accurately reasonable compensation for it . . . ."<sup>121</sup> Nevertheless, "compensation for such injuries must not be denied simply because it is not easily quantified."<sup>122</sup> The goal, regardless of the type of harm, is the same; "emotional damages, like other forms of compensatory damages, are designed to make the plaintiff whole, and therefore bear a significant and altogether determinable relationship to events in which the defendant entity participated and could have foreseen."<sup>123</sup> To establish whether the evidence is sufficient to warrant "an award of more than nominal damages for emotional distress, we examine factors such as the need for medical, psychological, or psychiatric treatment, the presence of physical symptoms, loss of income, and impact on the plaintiff's conduct and lifestyle."<sup>124</sup>

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118. Tracy et al., *supra* note 19, at 152 (noting the enduring nature of workplace bullying, "lasting over an extended period of time.").

119. Yamada, *supra* note 22, at 522 ("Legal protections for targets who choose to confront their tormentors would, at the very least, satisfy the policy goal of self-help and could help to shape a workplace culture that discourages bullying. The problem is that the employer-bully can fire the employee-target who confronts him. Unfortunately, even if we assume that confronting the bully would be construed legally as a form of speech, the law offers few protections to targets who engage in this brand of self-help.").

120. Doe v. Chao, 540 U.S. 614, 615 (2004) ("[T]ort recovery requires both wrongful act plus causation and proof of some harm for which damages can reasonably be assessed.").

121. McDonald v. United States, 555 F. Supp. 935, 971 (M.D. Pa. 1983).

122. Busche v. Burkee, 649 F.2d 509, 519 (7th Cir. 1981).

123. Sheely v. MRI Radiology Network, 505 F.3d 1173, 1199-1200 (11th Cir. 2007).

124. Doe v. Chao, 306 F.3d 170, 180 (4th Cir. 2002) (using the factors in the context of

The third requirement presupposes that the target, to the extent possible, has taken action to mitigate his or her damages and either has been successful (in which case there is no cause of action), or has failed either because the organization has no helping mechanism or because the harm has otherwise already rendered the target incapable of mitigation.

Building on the foregoing definition, the transformation of IIED into IIWA, may be stated thus:

*Intentional Infliction of Workplace Abuse*

- 1) The conduct must be intentional or reckless;
- 2) The conduct must result in actual bullying (as defined above);
- 3) There must be a causal connection between the wrongful conduct and the emotional and/or physical harm;
- 4) The conduct must occur in the workplace.

So, will the courts adopt this modified tort? There is no doubt that they are empowered to create new tort law or adopt the modification of an existing tort. This power stems from the flexibility given to courts as part of the growing common law tradition. Similarly, there is a significant need for the modified tort. As noted throughout this paper, bullying in the workplace is a serious problem and current tort law provides little or no relief. However, successful implementation will require substantial work on the part of the bar to challenge the bench, to demonstrate the need for the modified tort, and, accordingly, to urge its acceptance. The process will likely be slow, but there is great hope for acceptance. As a matter of practical understanding, tort law exists to punish unacceptable behavior and, by extension, encourage acceptable behavior.<sup>125</sup> “Bullying causes destructive patterns of workplace interactions that create a poisoned work environment for all employees. The social and economic costs of workplace bullying are long-term and far reaching.”<sup>126</sup> For these reasons, legal protections must be developed to protect “against workplace harassment [and] serve the interests of the government, employers, and employees.”<sup>127</sup>

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statutory interpretation).

125. Daniel W. Shuman, *The Psychology of Deterrence in Tort Law*, 42 U. KAN. L. REV. 115, 165 (1993) (“[T]he model of human behavior that underlies tort deterrence theory suggests the need for a modification of the tort system to increase the likelihood that undesirable behavior is perceived to be punished, and to increase the likelihood that desirable behavior is perceived not to be punished.”).

126. Gouveia, *supra* note 6, at 143 (2007).

127. *Id.*

### III. CONCLUSION

In this paper we have examined the nature and extent of the bully problem, and have considered, in some detail, both legislative and judicial relief. After considering the strengths and weaknesses of both systems, we have proposed a new cause of action to enable the bullied to seek direct relief through the courts. Given the lack of support received by the various state legislative bodies, tort relief appears to be the better approach. While courts are not inclined to quickly adopt new causes of action, that does not mean that courts are unwilling to act. Indeed, by its nature, common law is malleable, able to address evolving claims in light of changing circumstances. As Justice Sutherland observed nearly a century ago: “[T]he common law is not immutable but flexible, and by its own principles adapts itself to varying conditions.”<sup>128</sup>

This flexibility comes with a price—diligence, motivated by reason, to persevere, to, in the words of Winston Churchill, “never give in, never give in, never, never, never, never—in nothing, great or small, large or petty—never give in except to convictions of honour and good sense.”<sup>129</sup> So, here’s to the courts, to their drive to apply the law fairly, and to the hope that judicial resolve will recognize the need to vary existing principles of tort law in order to provide hope for the abused, for the underdog, for those with no place to turn, except to our great judicial body, to provide relief from the appalling treatment by the few against the many. We must never forget, “tyranny by the majority is as onerous as tyranny by a select minority.”<sup>130</sup>

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128. *Funk v. United States*, 290 U.S. 371, 383 (1933).

129. Winston Churchill, *Never Give In, Never, Never, Never*, October 29, 1941, available at <http://www.winstonchurchill.org/learn/speeches/quotations/famous-quotations-and-stories>.

130. *Banks v. Muncie Cmty. Sch.*, 433 F.2d 292, 297 (7th Cir. 1970).

*APPENDIX A*THE HEALTHY WORKPLACE BILL<sup>131</sup>

## SECTION I—FINDINGS AND PURPOSES

## A. LEGISLATIVE FINDINGS

The Legislature finds that:

1. the social and economic well-being of the State is dependent upon healthy and productive employees;

2. surveys and studies have documented between 16 and 21 percent of employees directly experience health-endangering workplace bullying, abuse, and harassment, and that this behavior is four times more prevalent than sexual harassment alone;

3. surveys and studies have documented that abusive work environments can have serious and even devastating effects on targeted employees, including feelings of shame and humiliation, stress, loss of sleep, severe anxiety, depression, post-traumatic stress disorder, suicidal tendencies, reduced immunity to infection, stress-related gastrointestinal disorders, hypertension, and pathophysiologic changes that increase the risk of cardiovascular disease.

4. surveys and studies have documented that abusive work environments can have serious consequences for employers, including reduced employee productivity and morale, higher turnover and absenteeism rates, and significant increases in medical and workers' compensation claims;

5. unless mistreated employees have been subjected to abusive treatment at work on the basis of race, color, sex, national origin, or age, they are unlikely to have legal recourse to redress such treatment;

6. legal protection from abusive work environments should not be limited to behavior grounded in protected class status as that provided for under employment discrimination statutes; and,

7. existing workers' compensation plans and common-law tort actions are inadequate to discourage this behavior or to provide adequate redress to employees who have been harmed by abusive work environments.

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131. David C. Yamada, *Crafting a Legislative Response to Workplace Bullying*, 8 EMP. RTS. & EMP. POL'Y J. 475, 517-21 (2004).

## B. LEGISLATIVE PURPOSE

It is the purpose of this Chapter:

1. to provide legal redress for employees who have been harmed, psychologically, physically, or economically, by being deliberately subjected to abusive work environments;
2. to provide legal incentive for employers to prevent and respond to mistreatment of employees at work.

## SECTION 2—DEFINITIONS

1. Employee. An employee is an individual employed by an employer, whereby the individual's labor is either controlled by the employer and/or the individual is economically dependent upon the employer in return for labor rendered.

2. Employer. An employer includes individuals, governments, governmental agencies, corporations, partnerships, associations, and unincorporated organizations that compensate individuals in return for performing labor.

3. Abusive work environment. An abusive work environment exists when the defendant, acting with malice, subjects the complainant to abusive conduct so severe that it causes tangible harm to the complainant.

a. Conduct. Conduct is defined as all forms of behavior, including acts and omissions of acts.

b. Malice. For purposes of this Chapter, malice is defined as the desire to see another person suffer psychological, physical, or economic harm, without legitimate cause or justification. Malice can be inferred from the presence of factors such as: outward expressions of hostility; harmful conduct inconsistent with an employer's legitimate business interests; a continuation of harmful, illegitimate conduct after the complainant requests that it cease or demonstrates outward signs of emotional or physical distress in the face of the conduct; or attempts to exploit the complainant's known psychological or physical vulnerability.

c. Abusive conduct. Abusive conduct is conduct that a reasonable person would find hostile, offensive, and unrelated to an employer's legitimate business interests. In considering whether abusive conduct is present, a trier of fact should weigh the severity, nature, and frequency of the defendant's conduct. Abusive conduct may include, but is not limited to: repeated infliction of verbal abuse such as the use of derogatory remarks, insults, and epithets; verbal or physical conduct that a reasonable person would find threatening, intimidating, or humiliating; or the



gratuitous sabotage or undermining of a person's work performance. A single act normally will not constitute abusive conduct, but an especially severe and egregious act may meet this standard.

d. Tangible harm. Tangible harm is defined as psychological harm or physical harm.

i. Psychological harm. Psychological harm is the material impairment of a person's mental health, as documented by a competent psychologist, psychiatrist, or psychotherapist, or supported by competent expert evidence at trial.

ii. Physical harm. Physical harm is the material impairment of a person's physical health or bodily integrity, as documented by a competent physician or supported by competent expert evidence at trial.

4. Negative employment decision. A negative employment decision is a termination, demotion, unfavorable reassignment, refusal to promote, or disciplinary action.

5. Constructive discharge. A constructive discharge shall be considered a termination, and, therefore, a negative employment decision within the meaning of this Chapter. For purposes of this Chapter, a showing of constructive discharge requires that the complainant establish the following three elements: (a) abusive conduct existed; (b) the employee resigned because of that abusive conduct; and, (c) prior to resigning, the employee brought to the employer's attention the existence of the abusive conduct and the employer failed to take reasonable steps to correct the situation.

### SECTION 3—UNLAWFUL EMPLOYMENT PRACTICE

It shall be an unlawful employment practice under this Chapter to subject an employee to an abusive work environment as defined by this Chapter.

### SECTION 4—EMPLOYER LIABILITY

An employer shall be vicariously liable for an unlawful employment practice, as defined by this Chapter, committed by its employee.

### SECTION 5—DEFENSES

A. It shall be an affirmative defense for an *employer only* that:

1. the employer exercised reasonable care to prevent and correct promptly any actionable behavior; and,
2. the complainant employee unreasonably failed to take advantage of

appropriate preventive or corrective opportunities provided by the employer.

This defense is not available when the actionable behavior culminates in a negative employment decision.

B. It shall be an affirmative defense that:

1. the complaint is grounded primarily upon a negative employment decision made consistent with an employer's legitimate business interests, such as a termination or demotion based on an employee's poor performance; or,

2. the complaint is grounded primarily upon a defendant's reasonable investigation about potentially illegal or unethical activity.

#### SECTION 6—RETALIATION

It shall be an unlawful employment practice under this Chapter to retaliate in any manner against an employee because she has opposed any unlawful employment practice under this Chapter, or because she has made a charge, testified, assisted, or participated in any manner in an investigation or proceeding under this Chapter, including, but not limited to, internal complaints and proceedings, arbitration and mediation proceedings, and legal actions.

#### SECTION 7—RELIEF

1. Relief generally. Where a defendant has been found to have committed an unlawful employment practice under this Chapter, the court may enjoin the defendant from engaging in the unlawful employment practice and may order any other relief that is deemed appropriate, including, but not limited to, reinstatement, removal of the offending party from the complainant's work environment, back pay, front pay, medical expenses, compensation for emotional distress, punitive damages, and attorney's fees.

2. Employer liability. Where an employer has been found to have committed an unlawful employment practice under this Chapter that did not culminate in a negative employment decision, its liability for damages for emotional distress shall not exceed \$25,000, and it shall not be subject to punitive damages. This provision does not apply to individually named co-employee defendants.

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**SECTION 8—PROCEDURES**

1. Private right of action. This Chapter shall be enforced solely by a private right of action.

2. Time limitations. An action commenced under this Chapter must be commenced no later than one year after the last act that comprises the alleged unlawful employment practice.

**SECTION 9—EFFECT ON OTHER STATE LAWS**

1. Other state laws. Nothing in this Chapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any law of the State.

2. Workers' compensation and election of remedies. This Chapter supersedes any previous statutory provision or judicial ruling that limits a person's legal remedies for the underlying behavior addressed here to workers' compensation. However, a person who believes that s/he has been subjected to an unlawful employment practice under this Chapter may elect to accept workers' compensation benefits in connection with the underlying behavior in lieu of bringing an action under this Chapter. A person who elects to accept workers' compensation may not bring an action under this Chapter for the same underlying behavior.